No. 14,567

United States Court of Appeals

For the Ninth Circuit

JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY CANNERIES, INC., and D. K. MACDONALD & CO.,

Appellees.

Appeal from the District Court for the Territory of Alaska, First Division.

BRIEF OF APPELLEES HALFERTY CANNERIES, INC., AND D. K. MacDONALD & CO.

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FACTS.

John Giske was employed by Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, as a net boss in defendant's salmon cannery. He cut his leg on September 3, 1952, but was able to continue with his employment until September 27, the end of the fishing season. He was temporarily disabled from that date until December 31, 1952.

During the period of his employment Giske earned $2,292.59, or an average of $17.63 per day. For many

years past he had worked during the summer fishing season in Alaska. He is and was a resident of Seattle, Washington, and during the period of the year when he was not employed in Alaska, which would be approximately seven months each year, he did some work repairing nets in Seattle, Washington.

His total earnings during this "off season" for the four years prior to his injury were as follows: 1948, $288.00; 1949, $648.00; 1950, $399.60; and 1951, none. Thus his average "off season" wages according to the evidence were $333.90; or, if the year during which he made no earnings is deleted, $445.20. Since the fishing season normally is of less than five months duration, the off season is a minimum period of seven months. Giske's average monthly wage during the previous four years was $47.70 and his daily wage during the past four years for that period of time was approximately $1.59. When the three years in which earnings were derived are considered alone, his monthly average wage was $63.60 and his average daily wage $2.12.

Mr. Giske was paid compensation for his disability during this off season on the basis of an average daily wage of $2.12, the Alaska Workmen's Compensation Act requiring payment at the rate of 65% of the employee's average daily wage. He filed an Application for Adjustment of Claim with the Alaska Industrial Board contending that he was entitled to compensation based on his average earnings for the year prior to his injury rather than on his earnings during the off season.

The case was first heard before Mr. Henry Benson, Chairman of the Board, who filed a detailed decision setting forth substantially the facts as outlined above and concluding that Giske was entitled to compensation at the rate of $7.05 per day based on an average of his annual earnings.

A rehearing was held before the full membership of the Alaska Industrial Board which reversed this decision, holding that Giske's average daily wage earning capacity during the period of his temporary disability was $3.88 per day, which figure was obviously based on the average daily wages of Mr. Giske during 1949, the year during which his "off season" wages were most substantial.

From this decision the employee appealed to the United States District Court for the District of Alaska, contending that his average daily wage should be $7.38 based on his yearly earnings.

The learned judge of the United States District Court affirmed the award of the full membership of the Alaska Industrial Board finding that Giske's daily wage earning capacity during his period of disability was $2.12 being less than the amount found by the board, but in view of the fact that the employer had not appealed, the court upheld the decision of the Alaska Industrial Board to the effect that the employee's average daily wage during the period of his disability was $3.88.

From this decision Mr. Giske has appealed. At no time in the proceedings before the Alaska Industrial

Board of the United States District Court did counsel for Giske make any objection in regard to any absence of Findings of Fact or of any specific findings.

ARGUMENT.

I.

APPELLANT IS PRECLUDED FROM ATTACKING THE DECISIONS BELOW IN REGARD TO ANY ALLEGED DEFICIENCY OF THE FINDINGS OF FACT SINCE APPELLANT MADE NO OBJECTION IN THAT REGARD BEFORE THE ALASKA INDUSTRIAL BOARD OR THE UNITED STATES DISTRICT COURT, OR IN HIS STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

Appellant contends that there was a failure to make findings of fact as required by Sec. 43-3-16, A.C.L.A. 1949. This section specifies:

> "If an application for review is made to the Industrial board * * * the full board * * * shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."

In the subject case, hearing was first had before Mr. Benson, chairman of the board. Mr. Benson gave a written decision including findings of fact, which findings of fact specified as follows:

> "John J. Giske, a 68 year old male, while employed as a net boss by Halferty Canneries, Inc., at Cordova, Alaska, on September 3, 1952, suffered an accidental injury resulting in temporary disability from a fall in which his right leg was twisted and cut between the ankle and knee. Tem-

porary disability continued from September 27, 1952, to January 1, 1953. Applicant's regular employment was that of net boss or web foreman. In this capacity his total earnings during the year 1951, the year previous to the accident, amounted to $2,540, all of which earnings were received from Halferty Canneries Inc. In 1952, for the period January 1 to September 27, his earnings were $2,292.59. Photostatic copies of the withholding statements for the years 1948, 1949 and 1950 show that Giske customarily had additional earnings while employed by marine supply firms in Seattle. These earnings range from $288 in 1948, $648 in 1949 and $399.60 in 1950. There were no such additional earnings in 1951. There is no showing either that Giske would or would not have had additional earnings except for his disability due to the injury and, accordingly, the Board assumes that his actual 1951 earnings fairly and reasonably represent his wage earning capacity in view of his age, disability and most recent work pattern. This average daily wage earning capacity is computed by dividing $2,540 by 360."

The matter was then reviewed by the full membership of the Alaska Industrial Board, which, in effect, affirmed the specific findings made by the chairman but set aside the decision based on the finding of daily wage earning capacity holding:

"The Decision in this matter made on August 13, 1953 is set aside and applicant is awarded compensation for temporary total disability from September 27, 1952 to December 31, 1952, inclusive. The average daily wage earning capacity is hereby fixed at $3.88."

No objection was made by counsel for appellant in regard to any failure of the full board to repeat the detailed findings of fact set forth in the chairman's original decision.

The appellant then filed his appeal with the United States District Court, which complaint and appeal merely alleged, insofar as is material here: "Said decision was erroneous as a matter of law in that the average daily wage earning capacity of plaintiff on a yearly basis was $7.38 daily instead of $3.88 daily." No mention was made of any failure to file findings of fact or specific findings of fact, and no argument to that effect was made before the United States District Court.

In designating the points relied upon for appeal to this honorable court, learned counsel for appellant made no mention of any deficiency in Alaska Industrial Board decisions or the District Court decree in regard to failure of the board to make specific findings of fact.

As a result of the failure to include this objection in the statement of points relied upon, appellees deemed it unnecessary to include in the record the original decision of Henry Benson, Chairman of the Alaska Industrial Board, which decision set forth the detailed statement of facts as indicated above and which statement of facts further was in effect adopted by the full board with the exception of the ultimate fact pertaining to the amount of the average daily wage earning capacity of the appellant. Moreover, due to appellant's failure to set forth this objection in the statement of

points relied upon, it was not deemed necessary to include appellant's complaint and appeal to the United States District Court which also made no mention of any alleged deficiency in regard to the findings of the Alaska Industrial Board.

In the case of *Western Nat. Ins. Co. v. LeClare,* 163 F. 2d 337, this honorable court stated:

> "Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

The general rule as pertains to objections to findings of fact is set forth in 4 C.J.S., Sec. 310, as follows:

> "As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal, unless no opportunity was given to present the question. Accordingly, it cannot be objected for the first time on appeal that the findings are indefinite or incomplete, informal, or not sufficiently specific * * *"

In the case of *Northwestern Steamship Co. v. Cochran,* 191 F. 146, it was stated:

> "The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection 'that plaintiff is not the real party in in-

> terest, and hence has no right to sue, comes too late when made for the first time in the appellate court.' "

This case involved an appeal from the United States District Court for the District of Alaska, Second Judicial Division.

This same, well established rule was enunciated by this learned court in the case of *DeJohn et al. v. Alaska Matanuska Coal Co. et al., Agostino v. Same,* 41 F. 2d 612, wherein the court stated:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us."

The *DeJohn* case is another case which was taken on appeal from a decision of the United States District Court for the District of Alaska.

These cases would certainly appear to be controlling as pertains to the objection now raised by appellant to the findings of fact since no objection was made in that regard either before the Alaska Industrial Board or the United States District Court. Certainly the United States District Court should have been given the opportunity to rule on this question had appellant desired to raise this issue and, furthermore, objections should have been taken before the Alaska Industrial Board as well.

The general requirements as to the necessary procedural steps to be taken before a question may be

raised on appeal apply to workmen's compensation questions as well as to other matters. Thus it is stated in 146 A.L.R. 125:

> "Of course, a party who wants to attack a compensation award for lack of requisite express findings may be required to take appropriate procedural steps, such as seasonably to request the administrative tribunal to make certain findings of fact. And he may waive the deficiency in the award." See *Ruud v. Minneapolis Street R. Co.,* 202 Minn. 480, 279 N.W. 224; *State ex rel. Probst v. Haid,* 333 Mo. 390, 62 S.W. 2d 869; *Chicago & E. R. Co. v. Kaufman,* 78 Ind. App. 474, 133 N.E. 399.

In a similar situation involving alleged deficiencies in the findings of an administrative tribunal, the Eighth Circuit Court of Appeals stated:

> "We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the referee in bankruptcy or to the District Court. The only question passed on by the referee and the District Court and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged. There is no support anywhere in the transcript of record for the allegations of fact set out in this assignment of error, that the petition in involuntary bankruptcy and the schedules were filed on the same day and that the schedules did include acknowledgment of the existence of the conditional sales contract, and that it was a

valid lien on the farm tractor." See *In re Elliott,* 72 F. 2d 300 at 303.

Not only is the appellant precluded from objecting to the findings made by the Alaska Industrial Board, but it is apparent that adequate findings were made. The findings of the Commissioner contained all of the specific facts upon which the ultimate award was based. These findings in effect were adopted by the full board with the exception of the change in regard to the ultimate fact pertaining to average wage earning capacity.

The cases cited by appellant for the most part do not appear to be relevant. Thus the case of *Howard v. Monahan,* 33 F. 2d 220, involved a case where no findings whatsoever had been entered by a Deputy Commissioner, although specifically instructed to make findings by the Compensation Commission.

In *Fireman's Fund Ins. Co. v. Peterson,* 120 F. 2d 547, 548, cited by appellant at page 8 of his brief, the only question was whether the decision of the Commissioner was in accordance with the law and findings were not involved.

In the case of *DeVore v. Maidt Plastering Co.,* 205 Okla. 610, 239 P. 2d 520, the findings failed to indicate on what theory the Commissioner had proceeded since they did not indicate whether the claimant "did not sustain an injury resulting in a strain to his back or whether it intended to find that he did receive such an injury, but that such injury did not constitute an accidental injury within the meaning of the workmen's

compensation act, or whether he did receive such an injury and that it did constitute an accidental injury but that it did not arise out of and in the course of employment." Accordingly, the order of the board was vacated for further proceedings and more detailed findings. In the subject case there is no question as to what the board's ultimate findings were. The board found that appellant's daily wage earning capacity was $3.88. The evidentiary facts on which this finding was based were set forth in detail in the decision of the chairman of the board and the documentary evidence was submitted *in toto* to the United States District Court. It thus became a simple question for the District Court on appeal to determine that the award was based upon substantial evidence that appellant's daily wage earning capacity during the period of his disability did not exceed $3.88 per day, and there was no ambiguous finding to be resolved by the District Court as in the *DeVore* case.

If the findings are deemed to be limited to the findings of the full board, the decision in the case of *Wimmer v. Hoage,* 90 F. 2d 373 (U.S.C.A., D.C.), would appear to state the applicable law when the court said:

> "It would have been more satisfactory if the Deputy Commissioner—as we have had occasion to admonish him before—had made specific findings based on the testimony introduced, for precisely that is what the act and regulations contemplate, and, as we think, require him to do. Because ordinarily such findings are necessary to enable us to say whether his award is in accordance

> with law. But enough appears here to convince us the claim is without merit, and so we think the holding of the Deputy Commissioner that the claimant is not entitled to compensation is clearly right and should be affirmed."

This result would be particularly applicable in the subject situation in view of the provision of the Alaska Workmen's Compensation Act to the effect that "An award by the full board shall be conclusive and binding as to all questions of fact * * *" Sec. 43-3-22, A.C.L.A. 1949.

Many cases hold that a general finding of a compensation tribunal for or against a claimant is, in effect, a finding of each and every fact necessary to support such general finding. *Armstrong v. Industrial Accident Comm.,* 219 Cal. 673, 28 P. 2d 672; *Garbowicz v. Industrial Commission,* 373 Ill. 268, 26 N.E. 2d 123; *Newman v. Rice-Stix Dry Goods Co.,* 335 Mo. 572, 73 S.W. 2d 264; *Amerada Petroleum Corp. v. White,* 179 Okla. 82, 64 P. 2d 660. In any event, it appears clear that appellant is precluded from raising this objection for the first time on appeal to this honorable court when no objection was made either before the Alaska Industrial Board or the United States District Court in regard to any alleged deficiency in the findings of the board nor were any findings requested by appellant. Also, the findings as made appear adequate and are amply supported by the evidence.

II.

THE EVIDENCE SUPPORTS THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

The Alaska Industrial Board found that appellant's average daily wage earning capacity during the period of disability was $3.88. It is conceded that appellant's work in Alaska in the fishing industry was seasonal. Thus his employment had commenced on May 18, 1952 and terminated at the end of the fishing season on September 27, 1952. Apparently this was his customary pattern of employment and the balance of the year he spent at his home in the State of Washington. During this balance of the year, being a minimum of seven months each year, he customarily made but very small earnings, ranging for the four years prior to his injury from a minimum of no earnings in 1951 to a maximum of $648.00 in 1949.

The extent of the fishing season is well known in Alaska and the Alaska Industrial Board took judicial notice of the fact that it terminated on September 27, 1952, the last date of Mr. Giske's employment, and this also was set forth in Judge Folta's findings of fact (see Finding 2, page 9, Tr.).

The applicable Alaska statute is Sec. 43-3-1, A.C.L.A. 1949, which provides, insofar as pertinent:

> "For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages * * *
>
> "The average daily wage earning capacity of an injured employee in case of temporary disability

> shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

A check of workmen's compensation statutes in the forty-eight states and the Territory of Hawaii fail to reveal any provision very closely akin to the Alaska statute quoted above. The wording appears to be closest to that found in the United States Longshoremen's and Harbor Workers' Act, Title 33, U.S.C.A., Sec. 908(h). The Longshore Act, however, deals with fixing a sum representing wage earning capacity to be used for weekly payments in cases of permanent partial disability and temporary partial disability. It does not apply, as does the Alaska Act, to situations involving temporary total disability and, accordingly, the decisions under this provision of the Longshore Act are not helpful in construing the Alaska Act. Even less relevant is a decision such as the case of *O'Hearne v. Maryland Casualty Co.,* 177 F. 2d 979, cited by appellant since it deals with an entirely different statutory basis for ascertaining average daily wages. The whole question in that case was whether compensation should

be awarded on the basis of 33 U.S.C.A., Sec. 910(b) or Sec. 910(c), and this in turn depended upon whether there was evidence to the effect that claimant's employment was intermittent and discontinuous. The court quoted from its previous decision in *Baltimore & O. R. Co. v. Clark,* 4 Cir., 59 F. 2d 595 at 599, as follows:

> "Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed * * *"

indicating its disapproval of payments based on average of annual earnings where employment is intermittent or discontinuous such as in the subject case.

The United States District Courts in Alaska in two Divisions have given constructions to the provision dealing with temporary disability compensation. The late Judge Anthony Dimond, in a detailed and very well reasoned decision, sets forth the applicable considerations in *Vanney v. Alaska Packers Ass'n,* 12 Alaska Rep. 284. Judge Dimond discussed the seasonality of various employments in Alaska, stating:

"The packing of salmon is a seasonal operation. In the Bristol Bay area, the actual taking of salmon is limited to a period of 30 days. But considerable work must be done in preparation for packing and, at the close of the season, in shipment of the pack. When salmon are plentiful all in the industry work at top speed and for long hours. Compensation is made not only by minimum base rate pay but by overtime and a share or percentage of the pack."

In discussing the Alaska statutory provision dealing with determination of average daily wage earning capacity, Judge Dimond states:

"It seems evident that the provisions of the law quoted above give to the Board a wide discretion, to be soundly and justly exercised, in fixing the average daily wage earning capacity of the injured employee, and that the discretion is not limited to the wages currently being earned daily by the employee at the time he sustained the injuries. For example, it seems plain that if the petitioner in this case had been unable, by reason of his injury, to perform any work after July 9, the date he sustained the injury, his disability compensation would rightly be calculated upon his full earning capacity for the season in his current employment, provided he was disabled for the entire remainder of the season.

"The origin of the above-quoted provisions of our statute (Sec. 43-3-1 ACLA 1949) is not known. The legislative history of the Act discloses no information on the subject.

"Under the law as written it appears to be the duty of the Board, in every such case, to deter-

mine the amount of wages or compensation the injured employee is capable of earning *and* of which he is or may be precluded from earning and receiving by reason of his injuries, and base the award on that result. Doubtless, evidence of the current and past wage earnings, including bonuses, percentages of product, and payments for overtime, as well as the commonly established or accepted standards of wages in the industry or occupation in which the injured employee has been engaged or which he may follow for a livelihood, are all factors that may be properly considered by the Board in making an award. *But the ultimate test is, what has the employee lost in wages or compensation by reason of his injuries? That seems to be the standard which the law prescribes, and the standard with which the Board endeavored to comply.''* (Last italics ours).

The test, as set forth above in Judge Dimond's decision, appears to be eminently fair and doubtlessly is what the Alaska legislature had in mind when it enacted the provision quoted above in Sec. 43-3-1 A.C.L.A. 1949. The purpose of workmen's compensation legislation is to partially compensate employees for disability resulting from injuries arising out of and in the course of their employment, with a view toward having the burden of the employee's loss of earnings absorbed by the general public in the price of the product rather than being borne by the employee alone. It was never intended, and, as far as can be ascertained by diligent research, has never been suggested by the most ardent proponents of liberal compensation legislation, that the employee was to

make a profit as a result of his injury. If the position of the appellant were to be upheld, it would lead to this patently absurd result. Thus, as is not at all uncommon, an employee could earn $1,000 a month while working seasonally in Alaska. During the off-season when the employee resided in one of the states where the cost of living is greatly less than in Alaska, he would be entitled to receive 65% of his average daily wage. It could be well established that the maximum wages which the employee would have been able to have earned in that state had he not been injured amounted to $200 per month. 65% of his loss of wages due to his injury would thus amount to $130 per month. If appellant's theory were taken, the employee would receive, during this period of time when the most he would have earned would have been $200.00, the sum of $650 per month based on 65% of his seasonal earnings, or, if the average of seasonal and non-seasonal earnings were taken, the sum of $390.00 a month ($1,000 plus $200 divided by 2 = $600 × 65% = $390 compensable wage). It further must be recognized that the sums received as workmen's compensation are not taxable under the federal income tax laws so that they represent substantially larger gross earnings than the amount specified. Certainly it would be an odd result to have a man receive substantially more than the earnings he would normally make while incapacitated under a compensation system whereby his compensation is awarded without regard to any fault of the employer.

The Alaskan situation is probably unique in lending itself to the possibility of such an anomalous situation.

It is well recognized that the cost of living in Alaska varies from 33⅓% to more than 50% higher than the equivalent costs in the states. Thus the last report prepared by the Territorial Department of Labor on relative food prices, using the average of stateside prices as 100, indicated that the comparative prices in Alaska varied from 133.12 in Ketchikan to 155.76 in Fairbanks and 156.41 in Kodiak. See Biennial Report, Territorial Department of Labor, 1949-50, page 7. Wages are extremely high during the seasonal periods of employment and vast numbers of workers come to the Territory during the summer months with a view to making their entire annual earnings, or almost their entire annual earnings, during that period of time. If the Alaska legislature had not made a provision such as that contained in Sec. 43-3-1 cited above, there would be a substantial incentive for employees to stay "disabled".

As Judge Dimond stated in his able opinion:

> "Just as no one should be denied a fair award because, by reason of his injury, he may be unable to prove that he would inevitably have had remunerative employment during the period of his actual disability, so also, one temporarily or seasonally employed at wages above the scale which he was earning or is capable of earning during the remainder of the year may not justly claim disability compensation based on those seasonal or temporary wages for a disability arising during such employment which does not really disable the employee until after the temporary or seasonal employment has been carried through to completion without any loss of wages therefor."

Counsel stated that "The injured workman's disability reaches into the future and not the past and that his loss as a result of such disability has an impact only on possible future earnings," citing Larson's Workmen's Compensation Law, Volume 2, page 71, section 60.11. Larson in that section is discussing installment payments for permanent partial disability; nevertheless, it is conceded that the disability reaches into the future and the loss as a result of the disability affects the earnings during that future period. The question presented in regard to determining average daily wage earning capacity under the Alaska Act is the amount of wages which the employee could reasonably have been anticipated to have earned during the period of disability had he not been injured. The only logical means of estimating such loss of earnings is based on the past record of employment of the employee in the absence of the employee showing unusual circumstances to indicate that he would have received wages on a different basis during the particular year that his disability resulted. The statement of Judge Dimond in the *Vanney* case in regard to the duty of the applicant to show any such unusual circumstances is equally pertinent to the subject situation. He said:

> "The petitioner himself offered no proof as to what he had earned in any preceding year between September 20 and December 31, or of his opportunity, actual or potential, for earnings between September 20 and December 31, 1946. Nor did he offer any proof as to his earnings, daily, weekly or monthly before June 1946. The only evidence on the subject was provided by the defendant's in-

surer to the effect that the petitioner paid income tax upon gross income of $2,519.92 received between January 1 and September 15, 1946. This was not disputed. We know from all of the evidence that of his total income during the period mentioned, he earned $1,463.70 between June 1 and September 15, 1946, and was paid that amount by the defendant Association, thus leaving a balance of $1,056.22 which he must have earned and received between January 1 and June 1, 1946, a period of five months, which, when broken down, would amount to $211.24 per month or almost exactly $7.00 per day. Between June 1 and September 15, 1946, under his seasonal employment by the Association, his earnings averaged $418.20 per month or $13.67 per day.

"The only reasonable conclusion at which one may arrive, in the absence of any other evidence on the subject, is that plaintiff's daily wages between September 20 and December 31, 1946, would probably not have exceeded the average of his earnings between January 1 and June 15, 1946. Accordingly, I find that the average wage earning capacity of the petitioner between September 20 and December 31, 1946, was not in excess of the amount agreed to by the Association's insurer and approved by the Board of $233.00 per month, or $7.76 per day, and the award of the Board of Compensation for so much of that period as falls between October 9 and December 31, 1946, inclusive, is affirmed.

"If the petitioner is entitled to any additional compensation based upon his anticipated or possible earnings between September 20 and December 31, 1946, he has had ample opportunity to so

show. He was at all times represented by counsel. No such showing has been made or even suggested."

The burden is always on the employee to prove his average daily wages in a compensation proceeding. See *City of Connersville v. Adams,* 121 Ind. App. 353, 98 N.E. 2d 230, and *Bennett v. Walsh Stevedoring Co.,* 46 So. 2d 834, 253 Ala. 685.

Judge Dimond's decision in the *Vanney* case has been followed by the United States District Court for the District of Alaska, First Judicial Division, in the cases of *Harold Arentsen, d.b.a. Arentsen & Co. v. Enos Moore and Alaska Industrial Board,* No. 6462-A, U.S.D.C., D.A., Div. No. One, and *Buchan & Heinen Packing Co v. Alice V. Lawseth and Alaska Industrial* Board, No. 6463-A, U.S.D.C., D.A., Div. No. One, as well as in the subject case. In both of those cases a decision was made by the Alaska Industrial Board whereby the employees were to be paid compensation during the "off-season" based on their average yearly earnings rather than based on the earnings the employee would reasonably have anticipated to have earned during the off-season had he not been injured. In both cases, the District Court reversed, remanding the cases to the Alaska Industrial Board, and ordered "that the Alaska Industrial Board amend it previous decision and award * * * so that the amount of average daily wages * * * is computed in conformity with the opinion rendered in the case of *Vanney v. Alaska Packers Ass'n,* 12 Alaska Rep. 284." In both of these

cases the board then proceeded to award compensation based on the average daily wages which the employee would otherwise have been able to have earned during the off-season.

In the subject case, the board took the most liberal position reasonably possible in making its award for Mr. Giske. The board did not take the average of the past four years' earnings during the off-season, nor did it take the average of the highest three of the four previous years' earnings during the off-season. The board took the year during the past four years during which the employee had made his largest earnings during the off-season and assumed that, in the absence of any evidence by the employee to the effect that he might have earned more during the present period of disability, that amount represented his maximum wage earning capacity. Thus the earnings of $648.00 during the year 1949 were taken as a basis for gauging the amount which he might otherwise have earned had he not been injured. On this basis, his average daily wage earning capacity during the period of his disability was found to be $3.88.

As mentioned above, the Alaska Workmen's Compensation Act specifies that the findings of the board "shall be conclusive and binding as to all questions of fact." Sec. 43-3-22 A.C.L.A. 1949. The board in the subject case has found that Giske's average daily wage during the period of his disability was $3.88 per day. This was affirmed by the learned judge of the United States District Court for the District of Alaska. The

law in regard to appeals from a board's findings is set forth in Larson's Workmen's Compensation Law, Volume 2, Sec. 80.10, as follows:

> "A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."

It would be superfluous to cite the many cases supporting this well established principal of law. Certainly there is substantial evidence upon which the Alaska Industrial Board and the United States District Court for the District of Alaska determined that Mr. Giske's average daily wage during the period of his disability was not in excess of $3.88 per day.

CONCLUSION.

Adequate findings of fact were made by the Alaska Industrial Board in its decision and award and, in any event, appellant is precluded from objecting to any alleged absence of findings in view of the fact that no requests for findings were made before the board and

no objections raised before the board or the United States District Court or in the statement of points relied upon on appeal.

The findings of the Alaska Industrial Board to the effect that Giske's average daily wage earning capacity during the period of his disability amounted to $3.88 was amply supported by the evidence, and it is respectfully submitted that the decree of the United States District Court for the District of Alaska should be affirmed.

Dated, Juneau, Alaska,
March 30, 1955.

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